APPENDIX B.

RESPONDENT'S PETITION FOR REHEARING BY FULL COURT

IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA CIRCUIT

No. 10,519

DISTRICT OF COLUMBIA, *Petitioner,*

v.

THE SMOOT SAND & GRAVEL CORPORATION, *Respondent.*

To: CHIEF JUDGE STEPHENS AND CIRCUIT JUDGES EDGERTON, CLARK, MILLER, PRETTYMAN, PROCTOR, BAZELON, FAHY, AND WASHINGTON.

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IN THE

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No. 10,519.

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v.

THE SMOOT SAND & GRAVEL CORPORATION, *Respondent*.

TO: CHIEF JUDGE STEPHENS AND CIRCUIT JUDGES EDGERTON, CLARK, MILLER, PRETTYMAN, PROCTOR, BAZELON, FAHY, AND WASHINGTON.

RESPONDENT'S PETITION FOR REHEARING BY FULL COURT

STATEMENT.

On March 28, 1949, Circuit Judges Edgerton, Prettyman, and Proctor, as a Division of this Court, through Circuit Judge Prettyman, rendered the Court's opinion in the prior appeal No. 9827, deciding for the company.[1] The District of Columbia petitioned the Supreme Court for *certiorari*

[1] *Smoot Sand & Gravel Corp.* v. *District of Columbia*, 84 U. S. App. D. C. 367, 174 F. (2d) 505 (1949).

with respect to the opinion in No. 9827 and *certiorari* was denied. Thereafter, pursuant to the opinion and mandate of this Court in No. 9827, the Board of Tax Appeals for the District of Columbia on November 30, 1949, entered its decision holding that the tax and penalty exacted of respondent for the years in controversy should be refunded in accordance with this Court's opinion and mandate. From that decision of the Board entered pursuant to the opinion and mandate of this Court the District filed its petition for review involved in the instant appeal No. 10,519 raising the sole question as to whether the Board had correctly followed the mandate of this Court in No. 9827.

The instant second appeal No. 10,519 came on for hearing before a Division of this Court consisting of Circuit Judges Proctor, Bazelon, and Fahy on April 13, 1950. Under date of July 24, 1950, this Court, through Circuit Judge Fahy, rendered its second opinion deciding the case against respondent and reversing the Board of Tax Appeals for the District of Columbia. Such second opinion in the instant appeal No. 10,519 reversing the Board

(1) effectually ignores and reverses this Court's opinion in the prior appeal No. 9827,

(2) provides an entirely new field of taxation for the District of Columbia with no enabling legislation by Congress,

(3) is grounded upon a new issue that was in no manner raised or presented on the prior appeal and as to which it was admitted, agreed, conceded, and fully understood that such issue was in no way involved for decision by this Court and which was not properly before this Court on the second appeal,

(4) provides effectually that there shall be no statute of limitations with respect to personal property taxes in the District of Columbia without the enactment of repealing legislation by Congress,

(5) fails to decide or even mention the Valuation Issue which the Court did not find it necessary to pass upon in its prior opinion,

(6) is predicated upon a complete misunderstanding of both the facts and legal questions that were before the Court on the prior appeal, and

(7) results in violation of the Constitution of the United States by authorizing the taking of property without due process of law, singling respondent out for unfair discriminatory treatment, denial of the right to equal treatment, the imposition of tax without any legislative standards whatsoever, and the retroactive imposition of tax and penalties without any standards whatsoever, legislative or otherwise.

In view of the foregoing and on the further grounds hereinafter stated, respondent respectfully requests that this Court

(a) withdraw its opinion entered July 24, 1950, and the findings of fact made therein and order a rehearing of this case before the full Court, or

(b) in the alternative, reverse its opinion entered July 24, 1950, reinstate its opinion entered March 28, 1949, and thus affirm the decision of the Board entered November 30, 1949.

ITEMIZATION OF PRINCIPAL ERRORS.

The Court's opinion on the instant appeal (No. 10,519) erred as follows:

1. In overlooking the fact that its opinion on the prior appeal (No. 9827) found that the transportation and production facilities involved had previously "been taxed upon an apportionment of their value" by the District of Columbia, thus eliminating any conceivable legal ground for further taxation by the District on an apportionment basis.

2. In overlooking the fact that the sole issue presented as to the basis for imposing the additional tax and penalties involved in No. 9827 related to taxation at full value and was stated on behalf of the Court by Circuit Judge Prettyman on that appeal as follows:

> "The question is whether the District of Columbia can levy its property tax upon the full value of these tugs and scows. For many years they have been taxed upon an apportionment of their value based upon use inside and use outside the District."

3. In overlooking the fact that the sole problem presented to the Court on the instant appeal from the Board's decision pursuant to this Court's mandate in No. 9827 was correctly stated at page 2 of the District's brief in No. 10,519 as follows:

> "This case involves the failure of the Board of Tax Appeals for the District of Columbia to comply with the mandate of this Court on petition for review in No. 9827 by the Company."

4. In holding that the instant "case need not turn on whether or not our mandate in" No. 9827 "has been obeyed," because that is and was the only problem before the Court in No. 10,519.

5. In holding and stating at the outset of its opinion in the instant appeal No. 10,519 that,

> "The principal question presented is whether under statutes applicable in the District of Columbia tugs, scows and launches owned by the respondent Delaware corporation and employed to a substantial degree in its business in the District may be subjected to the personal property tax of the District on an apportionment basis.
>
> "The problem is before us a second time • • • "

because such "principal question" as to taxation on an apportionment basis was not before the Court at all on the

prior appeal No. 9827 and could not properly have been raised or presented on the instant second appeal which involved solely the alleged "failure of the Board of Tax Appeals for the District of Columbia to comply with the mandate of this Court on" the prior appeal.

6. In finding and holding that the scows, tugs, and launches, *i.e.*, the transportation and production facilities involved, "are in a tax sense more or less permanently located in the District though not always here in the same sense as real estate" when **the record undeniably shows:**

(a) that for a period of more than nine months ending in June of 1940 the principal portion of the facilities were out of the District more than 97% of the time, having been in the District less than a combined total of one week of the entire period of more than nine months,[2]

(b) that in the normal course of its business respondent has always carried on a large and long established "down river" business in Virginia and Maryland requiring its facilities to be used on the lower Potomac, Patuxent, Rappahannock, and Great Wicomico Rivers at distances ranging up to more than 182 miles from Washington,[3]

(c) that respondent's sand and gravel deposits are located in Virginia and Maryland at distances from Washington ranging from 9½ miles to 51 miles and wholly control, require, and fix the primary location of the facilities at the deposits in Virginia and Maryland,[4]

(d) that production from respondent's deposits with the facilities is always wholly within Virginia or Maryland, transportation with the facilities is often wholly

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[2] See company's brief in No. 9827, p. 5.
[3] See company's brief in No. 9827, p. 4 and App. 26.
[4] See company's brief in No. 9827, p. 4 and App. 25.

within Maryland and Virginia without in any way touching upon District of Columbia waters, and production from its deposits and deliveries to the District are always such as to involve production—which takes 5 to 15 times longer than unloading—in Virginia or Maryland and transportation in one or both states,[5]

(e) that the Board of Tax Appeals for the District of Columbia found and held that the facilities spent more time "outside of the District of Columbia boundaries than within them",[6]

(f) that this Court in its prior opinion in No. 9827 found that the facilities "spend more time out of the District than in the District",

(g) that the Registered Home Port of the facilities is Alexandria, Virginia, and that respondent understands the facilities have been fully taxed by Virginia just as though they had never departed from Virginia,[7]

(h) that direction and control of the facilities have at all times been carried on primarily from Alexandria, Virginia,[8]

(i) that on a very conservative basis, during the entire period involved the facilities were in Virginia and Maryland more than 58% of the time and during 1945 and 1946 when more nearly normal—but still far from normal—peacetime operations were reestablished they were in Virginia and Maryland more than 66% and 71% of the time, respectively,[9] and

(j) that the record clearly shows—*and the District's own evidence fully corroborates*—that the facilities are

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[5] See company's brief in No. 9827, p. 4.

[6] See company's brief in No. 9827, App. 36 and 43.

[7] See company's brief in No. 9827, p. 6.

[8] See company's brief in No. 9827, p. 3.

[9] See company's brief in No. 9827, p. 6. If the issue of apportionment had been raised before the Board and litigated, it is believed that the facts would have shown that normally the facilities are in Virginia and Maryland to a greater extent than is shown to be the case for 1946.

primarily "located outside of Washington, D. C.," at "various locations in the States of Virginia and Maryland" and also shows the construction of such facilities in Virginia, Maryland, and elsewhere outside the District of Columbia.[10]

7. In failing to recognize that while the beer containers involved in *Queen City Brewing Co.* v. *District of Columbia,* 134 F. (2d) 44 (1943), *certiorari* denied 319 U. S. 767, 87 L. Ed. 1716 (1943), were in the District "only a few *days at a time,*" the tugs, scows, and launches here involved were in the District only a few *hours at a time.*[11]

8. In stating that "There was no special statute in Oklahoma authorizing the tax sustained as constitutional in *Johnson Oil Refining Co.* v. *Oklahoma,*" 290 U. S. 158, 78 L. Ed. 238 (1933), and failing to recognize that on the *identical point* this Court in *Queen City Brewing Co.* v. *District of Columbia, supra,* decided by Chief Justice Groner, Justice Miller, and Justice Vinson, stated:

> "We can find nothing in Johnson Oil Co. v. Oklahoma, 290 U. S. 158, strongly relied on by the District, which is contrary to what we have said. * * *
>
> * * * * * * * * * *
>
> "At the time of the decision there were in existence **two tax statutes** in Oklahoma, one taxing all property, real or personal, and the other specifically taxing the property of sleeping car companies, freight car companies, car corporations or companies engaged in business in the State. The latter provided for the filing

[10] See company's brief in No. 9827, p. 8. Until September, 1927, the business of this taxpayer was carried on by a Virginia corporation and since that time has been conducted by the Delaware corporation here involved; direction and control of both production and transportation have at all times been carried on primarily from Virginia; production at its deposits in Virginia and Maryland fix and control the primary location of the facilities, such production being the company's "problem" inasmuch as unloading requires less than 7% to 20% of the time required for production; and the facilities here involved are essential and integral parts of the machinery required in the production and processing of material in Virginia and Maryland. See company's brief in No. 9827, pp. 2-6.

[11] See company's brief in No. 9827, App. 62.

> with the Auditor of a statement showing the aggregate number of miles made by cars operated by such companies over the several lines of railroad in the State, the valuation of the cars and the number required to show the total mileage of the cars in any year and for an assessment based on this finding. After the remand by the Supreme Court the case was disposed of in the Supreme Court of the State on the basis of the average number of cars present on a given day at any one taxable point, **doubtless responsive to the latter section.** But from the beginning to the end of the opinion of the Supreme Court of the United States there is nothing to even suggest that the Court considered the question of statutory interpretation."

9. In stating that "In the *Brewing Company* case, on the contrary, there was no situs to support a District tax" when a correct statement of the rationale of that case is:

> In the *Brewing Company* case there was no situs to support a District tax **at full value** and there was **no statute imposing an apportioned tax,**

this Court having expressly stated that the beer containers could be taxed only if "legislation to reach them had" been enacted to include "a definite and fair method of 'average' assessment," *i.e.*, an apportioned tax and having further stated that "it is **unthinkable** that had Congress intended to bring the character of property we are concerned with here within the purview of local taxation it would not have passed adequate laws to this end."

10. In stating that personal property "tax has not been paid in Maryland," apparently without recognition of the fact that the State Tax Commission of Maryland, after full and complete hearing, held that the facilities were not taxable under the Maryland law because not permanently located within the state.[12]

11. In stating "that taxes are levied on the equipment in Virginia on the basis of an assessment of approximately

[12] See company's brief in No. 9827, p. 53.

30% of its value" without recognition of the fact that it is respondent's understanding that Virginia has imposed the full weight of its personal property tax against the facilities just as though they had never departed from Virginia.[13]

12. In relying upon 47 D. C. Code, sec. 1207 (1940) imposing tax on "vessels, ships, boats," and other vehicles without determining whether—since the instant appeal is being treated by the Court as a *de novo* proceeding—47 D. C. Code, sec. 1212 (1940) expressly provides a full and complete exemption applicable here with respect to "any vessel, ship, or boat" which "has been assessed for taxation and the taxes paid elsewhere."

13. In relying upon the construction of state statutes without recognizing (a) that state legislatures generally impose tax to the full extent of the states' constitutional power to tax, (b) that just the opposite is true of tax legislation enacted for the District of Columbia by the representatives of the states in Congress (*Queen City Brewing Co.* v. *District of Columbia, supra*), and (c) that the legislative history of the statute involved in the instant proceeding shows that Congress intended to cover only property "taken out of the taxable wealth of the" states (Congressional Record, 57th Congress, p. 4951).

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[13] See No. 9827, Tr. 354, 363, and 364. It should be borne in mind that in this Court's first opinion the Valuation Issue was in no way passed upon or even mentioned. The same is true of the Court's second opinion, except for its finding "that taxes are levied on the equipment in Virginia on the basis of an assessment of approximately 30% of its value." On that basis it will be noted that the District's assessments complained of on the prior appeal No. 9827 are

for 1941 approximately 6½ times the value of the equipment,
for 1942 appoximately 6 times its value,
for 1943 approximately 5 times its value,
for 1944 approximately 4½ times its value, and
for 1945 approximately 4 times its value.

On the same basis it will be noted that the District's proposed plan for alleged fair and equitable apportionment calls for assessments

for 1941 approximately 11 times the value of the equipment,
for 1942 approximately 10 times its value,
for 1943 approximately 9 times its value,
for 1944 approximately 8 times its value, and
for 1945 approximately 7½ times its value.

See Company's brief in No. 10,519, p. 11, and No. 9827, Tr. 363.

14. In failing to recognize that no issue with respect to apportionment was ever litigated on the prior appeal and

(a) that the District expressly agreed, admitted, and conceded in writing that no such issue was in any way involved and in its briefs so advised the Board, this Court, and the Supreme Court,[14]

(b) that respondent fully understood that no issue as to apportionment was involved and in its brief so advised this Court,[15] and

(c) that in the course of the hearing before the Board upon the mandate in No. 9827, counsel for the District fully reaffirmed that no issue as to apportionment had ever been involved as follows:

> "Mr. Updegraff: * * * Now it is true, we have said all along and we say now, that the District statute does not provide for any apportionment basis. We have consistently argued all the way up to the Supreme Court that the statute requires the tax to be imposed upon the full and true value * * * ."

15. In stating that the District of Columbia personal property tax statute involved "should not be construed paradoxically not to include these vessels"

(a) although the statute has been uniformly construed for nearly half a century not to include any other instrument of interstate commerce on an apportionment basis, and

(b) although **the real paradox** relates to why this Court should on the second appeal entertain an issue conceded and not raised by the District of Columbia on the prior appeal and impose additional tax on an apportionment basis as to which the District expressly agreed, admitted, and conceded in writing that it was not entitled on the prior appeal and undeniably main-

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[14] See company's brief in No. 10,519, pp. 8-10, 12, 30, and 31.

[15] See company's brief in No. 9827, p. 6.

tained that position before the Board, this Court, and the Supreme Court.[16]

16. In holding "that the enactment by Congress of special and detailed legislation for the taxation of railroad locomotives and rolling stock which is in the District of Columbia part of the time" does not "negative a construction of the general taxing statutes which would permit an apportioned tax on personal property not included in such separate legislation"

(a) although admittedly the Court rejects any suggestion of "a legal distinction * * * between railroad cars and land vehicles, on the one hand, and on the other, ships or vessels engaged in interstate commerce but having a home port,"

(b) although admittedly neither "the special treatment by Congress of the problem of railroad equipment, nor * * * the special legislation applicable to motor vehicles, which are taxed according to the number of months they have a situs in the District," recognized by the Court on the second appeal as existing, is applicable to respondent's water transportation facilities on an equitable or any other basis,

(c) although it must be admitted that the legislation providing fair and equitable apportionment for railroads in the District was enacted by Congress in 1945 on the basis of the definite assurance of the District of Columbia Commissioners that it was not believed that the District had authority to impose any such apportioned tax without such special legislation, and

(d) although it must be admitted that in 1945 Congress agreed with the Commissioners and enacted the special legislation providing for taxation of railroad equipment on the basis of fair and equitable apportion-

[16] See note 14, *supra*.

ment with the clear and definite understanding that no apportioned tax could be imposed without such legislation.[17]

17. In relying upon the Supreme Court's opinion in *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, 93 L. Ed. 431 (1949), without recognizing that in the *Ott* case Mr. Justice Douglas expressly pointed out the understanding of the Supreme Court that the Louisiana statute "was intended to cover and actually covers here, an average portion of the property permanently within the state—and by permanently is meant throughout the taxing year," and, accordingly, further pointed out that there was no suggestion of "an absence of any administrative or judicial remedy in Louisiana to correct errors in the assessment. Cf. *Hillsborough Twp.* v. *Cromwell,* 326 U. S. 620, 90 L. Ed. 358, 66 S. Ct. 445."

18. In holding that the statute of limitations provided by 47 D. C. Code, sec. 1408 (1940) does not bar additional assessments for the years 1941 to 1945 on the alleged ground that in the case of an "incorrect return, whether in good faith or otherwise, the tax may be assessed at any time," which **necessarily means that there is no statute of limitations in the District of Columbia**, and in holding

(a) that the filing of the returns involved by respondent in exact accordance with its agreement with responsible District of Columbia officials and on the basis of complete and full disclosure and knowledge, affords respondent no protection,[18] and

(b) that the filing of further returns now on any basis agreed upon with the District of Columbia would afford no protection in the event that basis is later questioned and determined to be "incorrect."

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17 See company's brief in No. 9827, pp. 27-28.

18 See company's brief in No. 9827, pp. 33-34, and the company's reply brief in No. 9827, pp. 34-35.

19. In failing to decide the Valuation Issue or to explain what disposition is to be made thereof, the Court on the prior appeal having found it unnecessary to pass upon such Valuation Issue just as it found it unnecessary to pass upon the Statute of Limitations Issue.[19]

20. In failing to recognize and hold that the sole and only reason the Court did not find it necessary to deal with or even mention the Valuation and Statute of Limitations Issues on the prior appeal was that its opinion in No. 9827 was final and intended to put an end to this litigation and that such should properly have been the holding of this Court on the instant appeal No. 10,519.

21. In holding and directing that respondent now "should be afforded another opportunity to submit a plan for consideration" as to a method of apportionment and that the District should later on "formulate its plan" for taxation on the basis of apportionment to be retroactively binding on respondent for years beginning in July 1940 because

(a) such action on the part of respondent might now and hereafter be construed as lending a color of legality to the wholly illegal exactions imposed against it without any plan or color of right in the past and

(b) the District of Columbia has already made it plain that its plan for an alleged fair and equitable method of apportionment calls for a tax on an assessment at 100% of greatly exaggerated full value plus a tax on an additional assessment of 73% added write-up of the greatly exaggerated value over and above 100%, *i.e.*, the District's plan for granting fair and equitable apportionment to the respondent is to increase the assessment from 100% of exaggerated full value to 173% of such exaggerated full value![20]

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[19] The Court's failure in its second opinion to deal with the very serious Valuation Issue is wholly inexplicable. See footnote 13, *supra*.

[20] For details as to the District's shockingly unfair plan see the company's brief in No. 10,519, pp. 11 and 21.

21. In effectually ignoring and reversing its unanimous opinion rendered March 28, 1949, in the prior appeal No. 9827 on the District's petition for review of a decision of the Board following this Court's mandate, such reversal being on the basis of an issue which was never in any manner before the Court on the prior appeal and which clearly is not properly before the Court on the instant appeal.

22. In approving violations of the Constitution of the United States by placing such a construction on the applicable statutes as to authorize the taking of property without due process of law, singling respondent out for unfair discriminatory treatment, denial of the right to equal treatment, the imposition of tax without any legislative standards pursuant to which respondent's legal obligation may be determined, and the retroactive imposition of tax and penalties without any standards whatsoever, legislative or otherwise.

DISCUSSION.

The opinion in the instant second appeal No. 10,519 is so completely unsound and wholly wrong that argument with respect thereto is extremely difficult.

Obviously, in our presentation of the case on the second appeal we utterly failed in our plain duty to inform the Court as to the factual and legal situation involved. As a result, the second opinion reverses the Court's prior opinion on the basis of (a) non-existent facts, (b) a new issue that was not before the Court at all on the prior appeal and not properly before it on the second appeal, (c) principles that usurp the exclusive power of Congress to enact tax legislation for the District of Columbia, and (d) a construction that would, if sustained, manifestly render the applicable statute unconstitutional.

POINT I. The facts show that there is no scintilla of basis for the Court's conclusion in its second opinion that the transportation and production facilities involved "are in a tax sense more or less permanently located in the District though not always here in the same sense as real estate."

In order that the Court may now be given an understanding of the basic facts of record, they are briefly stated as follows:

Respondent was incorporated under the laws of the State of Delaware in September 1927 and has at all times paid the franchise tax imposed by Delaware and maintained its principal office in that State at 7 West 10th Street, Wilmington, Delaware, where it conducts corporate meetings (Tr. 384, 381, App. 23).[21] It is engaged in the business of producing, transporting, and selling sand and gravel (Tr. 327, 328, 384, 385, 419, App. 23). From 1922 until September 1927 the business was carried on by a Virginia corporation known as The Smoot Sand & Gravel Corporation of Virginia (Tr. 327, App. 27-33). Prior to 1922 the business was operated as a sole proprietorship (Tr. 327).

Production of sand and gravel is carried on by respondent in Virginia and Maryland (Tr. 255-261, 358, 359, 384, 385, 420, Ex. 1). The scows, tugs, and launches involved in this controversy are essential and integral parts of the machinery required in the production and processing of material in Virginia and Maryland (Tr. 248-250).

Transportation of sand and gravel is carried on from the points of production in Virginia or Maryland to any point or points on the Potomac River and its tributaries and the Chesapeake Bay and its tributary system of waterways in accordance with the requirements of respondent's customers (Tr. 247, 324, Exs. 1, 2, App. 26). Only 11 miles of this system of waterways, maintained by the United States, open to the commerce of the World and extending for hun-

[21] All record citations are to the prior appeal No. 9827 unless otherwise indicated.

dreds of miles, touch upon the District of Columbia (Exs. 1 & 2).

Direction and control of both production and transportation have at all times been carried on primarily from the State of Virginia, such direction and control being directed principally from Alexandria, Virginia, the Registered Home Port of respondent's facilities (Tr. 248, 384, 385, 420, Exs. 7-14). The Marine Superintendent in charge of all production and transportation for respondent and the other men in its Production and Transportation Department seldom come into respondent's Washington office and then only for a few minutes at a time (Tr. 248, 384, 385, 419).

Respondent does not own any deposits of sand and gravel in the District of Columbia and under regulations of the War Department could not dredge material from them if it did own such deposits (Tr. 358, 359, 370). Sand and gravel deposits owned by respondent are located at 13 points along the shores of the Potomac River or its tributaries in Virginia and Maryland, six being in Virginia and seven in Maryland and their distances below Washington ranging from 9½ miles to 51 miles (Tr. 255-261, Ex. 1).

Both production and transportation are often wholly within the State of Virginia, often wholly within the State of Maryland, and often wholly within the States of Virginia and Maryland without in any way touching upon District of Columbia waters (Tr. 255-261, Exs. 1, 2, App. 26). No production from respondent's deposits and deliveries to the District of Columbia were ever wholly within the District of Columbia, inasmuch as such deliveries always involved production in Virginia or Maryland and transportation in one or both states (Tr. 255-261, Exs. 1, 2).

Sales of sand and gravel were made principally in the District of Columbia, Maryland, and Virginia (Tr. 384). However, sales were also made in Delaware, New York, and other states (Tr. 384).

In the normal course of its business, respondent has carried on a large and long established "down river" business in addition to that in nearby Virginia, Maryland, and the District of Columbia (Tr. 293-294, 297, 362, Exs. 1, 2, 4, App. 26). All deliveries of sand and gravel were made from the points of production in Virginia or Maryland with respondent's own tugs and scows (Tr. 264, 265, 311). Since 1935 the principal down river deliveries on the Chesapeake Bay and its tributary system of waterways, such as the lower Potomac, Patuxent, the Rappahannock, and the Great Wicomico Rivers have been to 22 places in Virginia and 10 places in Maryland at distances from Washington as far as 182½ miles (Tr. 247, 324, Exs. 1, 2, 4, App. 26).

Transportation of material from its deposits in Virginia and Maryland to be used in the construction of the Potomac River Bridge, 61 Miles below Washington, affords an illustration of a typical down river delivery (Tr. 265-270, App. 26, Ex. 4).

Deliveries to the Potomac River bridge were made during the period from September 8, 1939, through June 14, 1940, and required all of respondent's steel scows and much of its remaining transportation facilities. Thus, such facilities were in the District of Columbia less than 3% of the time, having come into the District for less than a total of one week during the entire nine-month period immediately preceding July 1, 1940, *i. e.,* the first taxable period involved in this proceeding (Tr. 265-270, 297, 310, App. 26, Exs. 4, 5).

Respondent's "problem is" production "and not unloading" (Tr. 280). The actual time required to load a scow is from approximately 5 to 15 times as great—depending upon whether fine gravel, concrete sand, building sand, or tailings are being loaded—as that required to unload a scow (Tr. 288, 292, 310).

Respondent's scows, tugs, and launches have at all times been primarily located in Virginia and Maryland in every

sense of the term primarily. The Board found as a fact and held that these instruments of production in Virginia and Maryland and of water transportation employed in interstate commerce spent more time in Virginia and Maryland than they did in the District of Columbia (App. 36, 43). This Court found as a fact in its prior opinion that the scows, tugs, and launches "spend more time out of the District than in the District." During the entire period involved in this controversy, they were in Virginia and Maryland more than 58% of the time and during 1945 and 1946 when more nearly normal operations were reestablished, they were in Virginia and Maryland more than 66% and 71% of the time, respectively (Tr. 54-59, 309-311, 270-283, 293, 315, 318, Exs. 5, 6).

During all of the years involved the equipment in question has been assessed for tangible personal property taxation by the Virginia taxing authorities at its Registered Home Port of Alexandria, Virginia, and the tax so assessed has always been paid (Tr. 354, 363, 364, App. 30). The *daily* average number of respondent's scows entering or berthed at the Port of Alexandria ranged from a maximum of 31 to a minimum of 2 during the years involved (Exs. 5, 41, Tr. 274, 277, 324, 364). The Virginia taxing authorities examined the scows for the purpose of increasing the assessments and it has always been respondent's understanding that the scows, along with its other items of floating equipment, were included in the assessment of tax paid each year to the State of Virginia (Tr. 354, 363, 364, App. 30).

The District's own evidence (App. 85) expressly shows that "The tangible property of The Smoot Sand & Gravel Corporation" involved in this proceeding was "located outside of Washington, D. C.," at "various locations in the States of Virginia and Maryland" (Tr. 569-623). The District's own evidence further expressly shows (a) the construction of respondent's transportation facilities in Vir-

ginia, Maryland, and elsewhere outside the District of Columbia, (b) respondent's production of all material from "extensive sand and gravel deposits in the States of Maryland and Virginia," (c) respondent's stock piling of approximately one quarter million cubic yards of material outside the District of Columbia after production in Virginia and Maryland, (d) respondent's unloading facilities at Occoquan, Virginia, and Alexandria, Virginia, and (e) additional equipment owned by the respondent at other places along the Potomac River in Virginia and Maryland (App. 83-95, Tr. 568, 623).[22]

Clearly, THE SECOND OPINION'S STATEMENT that the transportation and production facilities involved "are in a tax sense more or less permanently located in the District though not always here in the same sense as real estate" **should be corrected to read:**

> THE TRANSPORTATION AND PRODUCTION FACILITIES INVOLVED ARE IN A TAX SENSE MORE OR LESS PERMANENTLY LOCATED IN VIRGINIA AND MARYLAND THOUGH NOT ALWAYS THERE IN THE SAME SENSE AS REAL ESTATE.

POINT II. The sole issue as to the basis for taxation presented on the prior appeal was whether there could be taxation at full value or not at all. No issue as to apportionment was raised or presented on that appeal. On the contrary, the District repeatedly agreed, admitted, and conceded before the Board, before this Court, and certified to the Supreme Court that it was not contending for any right to impose an apportioned tax. There is no doubt about this and the District over and over again so agreed, admitted, and conceded. This Court on the prior appeal clearly understood that no apportionment issue was involved.

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22 The District is bound by and cannot properly be allowed to deny its own evidence fully and accurately corroborating the primary location of the tugs, scows, and launches outside the boundaries of the District of Columbia in Virginia and Maryland. The controlling rule has heretofore been followed by this Court. See company's brief in No. 9827, App. 87-91.

See below.

POINT III. Congress has not imposed the District of Columbia tangible personal property tax against respondent's tugs, scows, and launches on the basis of apportionment. Consideration of legislative history, administrative construction, judicial interpretation, and reaffirmation by Congress as late as 1945 leaves no room for uncertainty on this score.

See below.

POINT IV. This Court erred in entertaining the newly raised apportionment issue on the second appeal and erred in reversing its opinion on the prior appeal because, first, such new issue is without merit and, second, such new issue was not properly before the Court.

Points II, III, and IV are factually and legally accurate. This is true with such absolute certainty that lengthy discussion is not necessary. No amount of argument or denial can add to or detract from their accuracy. Consequently, each will be dealt with briefly.

POINT II.

Circuit Judge Prettyman's statement of the sole issue as to the basis for taxation presented on the prior appeal is: "The question is whether the District of Columbia can levy its property tax **upon the full value** of these tugs and scows."

That Circuit Judge Prettyman correctly stated the issue is conclusively shown by the following:

1. The District's brief filed with this Court on the prior appeal No. 9827 at page 26 states—just as the District had admitted, agreed, and conceded all along in the proceeding—that apportionment "has no basis in the District law or applicable decisions."

2. The District certified to the Supreme Court in support of its petition for *certiorari* with respect to the opinion in the prior appeal that the applicable District of Columbia

statutes "do not permit taxation of vessels and boats on a basis of apportionment of value" and also certified to the Supreme Court that "Congress has not declared any such rule of apportionment."

3. Upon the hearing before the Board on the opinion and mandate of this Court in the prior appeal No. 9827, counsel for the District stated:

> "Mr. Updegraff: * * * Now it is true, we have said all along and we say now, that the District statute does not provide for any apportionment basis. We have consistently argued all the way up to the Supreme Court that the statute requires the tax to be imposed upon the full and true value * * *."

4. The company's brief (p. 6) filed with this Court on the prior appeal No. 9827 advised the Court that the District had expressly conceded that no apportionment issue was involved as follows:

> "By administrative construction the respondent has always recognized that the District of Columbia tangible personal property tax law does not provide for taxation of the equipment involved on the basis of apportionment and has expressly conceded in this case that the 'District tax statutes involved do not provide for apportionment.' (Tr. 185). * * *"

5. The District's brief filed with this Court in reply to respondent's brief on the prior appeal fully concurred that apportionment with respect to the tugs, scows, and launches "has no basis in the District law or applicable decisions" and urged taxation at full value without any qualification whatsoever.

No issue as to apportionment was in any manner raised or presented on the prior appeal. There is no doubt about this fact and it is so clear that it is beyond the realm of argument or denial.

The Division of the Court that heard the second appeal will doubtless recall that with respect to the newly raised apportionment issue counsel for the District flatly took

the position that in order to render a decision favorable to the District on the new issue *Queen City Brewing Co.* v. *District of Columbia, supra,* would have to be reversed. Previously, there had never been the slightest suggestion that the *Queen City* case must be reversed for the simple reason that the District had on the prior appeal **advanced solely the issue as to taxation at full value,** primarily on the basis of a "commercial domicile" allegedly giving sufficient situs for taxation at full value regardless of the location of the facilities. The District's position to the effect that it mattered not whether the facilities in question ever entered or in any manner touched upon District of Columbia territory and showing clearly that no possible apportionment issue was even remotely involved can be no better illustrated than by giving two examples from the record of the original trial as follows:

1. At the original trial of this case counsel for the District insisted as follows:

> "Mr. Updegraff: If your Honor please, I feel that this map **showing the various locations outside the District of Columbia** and where the Petitioner has sand and gravel deposits, **is entirely immaterial. Whether this floating equipment goes to and from the District, or stays there makes no difference.** Therefore, I think the map is immaterial and protest the preceding testimony as immaterial." (Tr. 261-262).

2. At the original trial, also, the Board concurred in the position of counsel for the District and took the view that insofar as the location of respondent's deposits outside of the District of Columbia was concerned **"it does not make any difference whether it is five miles or fifty."** (Tr. 255).

There is no misunderstanding here. The newly raised apportionment issue is an obvious after thought which came into being following the denial of *certiorari* by the Supreme Court with respect to the opinion of this Court on the prior appeal.

When does litigation end?

Are we now free to raise an issue that may have been overlooked or that we decided not to raise and present on the prior appeal?

Will both parties be free to raise new issues when the second mandate of this Court is issued?

These questions are seriously asked in all earnestness and sincerity. We respectfully submit that if the opinion of this Court on the second appeal affords the answers, there has been a revolutionary change in our judicial procedure in this country of such a startling nature that it was never heretofore dreamed of.

POINT III.

It is a plain, simple, undeniable fact that Congress has not imposed the District of Columbia tangible personal property tax against respondent's tugs, scows, and launches on the basis of apportionment. This is confirmed by the explicit terms of the law and by the Congressional Record,[23] by letter dated July 17, 1945, from the President of the Board of Commissioners for the District of Columbia to the Chairman of the Senate Committee on the District of Columbia,[24] by Congress in 1945 when it enacted a special statute taxing railway equipment on an apportionment basis because it was deemed necessary to grant such "specific statutory authority" in order to impose such apportioned tax,[25] by the President of the United States when he approved the special apportionment statute taxing railway equipment which theretofore could not be taxed on any basis, [26] and by this Court in *Queen City Brewing Co.* v. *District of Columbia, supra.*

It is highly instructive to note that even with the special apportionment statute enacted in 1945 no tax was imposed

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[23] See Congressional Record, 57th Congress, p. 4896, *et seq.*, and company's brief in No. 9827, pp. 24-28.

[24] See company's brief in No. 9827, p. 27.

[25] See company's brief in No. 9827, p. 27.

[26] See company's brief in No. 9827, p. 27.

on railway transportation facilities—legally identical in all respects with respondent's water transportation facilities—until 1947. *Pennsylvania Railroad Co.* v. *District of Columbia* (D. C. B. T. A., Docket No. 1024, Opinion No. 656, August 18, 1947) Prentice-Hall State & Local Tax Service for the District of Columbia par. 50,006. The opinion in the *Pennsylvania Railroad Co.* case reads, in part, as follows:

> "The question in this case is whether the Act of December 15, 1945 (59 Stat. ch. 579; D. C. Code Supp. V, sec. 47-1215) applies to the fiscal year 1946, or only to years subsequent thereto.
>
> "The law specifies a method for taxation of the rolling stock of railroads which is not primarily located in the District of Columbia but is operated therein. **Prior to the enactment of this law, such property had not been subject to taxation in the District.** Queen City Brewing Co. v. District of Columbia, 77 U.S. App. D.C. 213, 134 F. 2d 44.
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> "Furthermore, **in cases such as this, where the property sought to be taxed was not taxable prior to the passage of the statute,** Queen City Brewing Co. v. District of Columbia, 77 U. S. App. D. C. 213, 134 F. 2d 44, **to give the statute a retrospective interpretation would, at least, raise doubts as to its constitutionality,** First National Bank of Covington v. Covington, 103 F. 523, aff'd 198 U. S. 100; Nichols v. Coolidge, 274 U. S. 531; Blodgett v. Holden, 275 U. S. 142, 147; Untermyer v. Anderson, 276 U. S. 440; cf. Commonwealth v. Citizens National Bank, 117 Ky. 946, 947, quoted in Citizens National Bank v. Kentucky, 217 U. S. 443, 452. **Under the rule hereinbefore stated, this should be avoided if possible.**
>
> "Unless the contrary plainly appears, a statute operates prospectively only and ought not to be construed to operate retrospectively in the absence of clear, strong and imperative language demanding it, and if a double sense is possible, that which rejects retroactive operation must be selected, Gould v. Gould, 245 U. S. 151, 153; Hassett v. Welch, 303 U. S. 314; Neild v. District of Columbia, 71 App. D. C. 306, 314, 110 F. 2d 246.

"Upon consideration of all of the foregoing factors, it is believed that the proper construction and application of the Act requires that it be held that **the tax thereby imposed is not effective for any fiscal year prior to 1947, and decision will be entered for the petitioner.**"

The District did not attempt to tax the railway facilities prior to 1946 and accepted the foregoing opinion as correct.

BY WHAT PRINCIPLES ARE RESPONDENT'S WATER TRANSPORTATION FACILITIES TO BE TAXED ON AN APPORTIONMENT BASIS FROM JULY 1940 WITHOUT ANY STATUTORY AUTHORIZATION WHATSOEVER AND RAILWAY TRANSPORTATION FACILITIES TO BE TREATED AS WHOLLY FREE OF SUCH TAX PRIOR TO 1947?

POINT IV.

This Court clearly erred in entertaining the newly raised apportionment issue on the second appeal upon which it reversed its opinion on the prior appeal because, *first,* the new issue is without merit and, *second,* the new issue was not properly before the Court.

The complete lack of merit with respect to the newly raised apportionment issue has been fully shown.

With equal certainty, the newly raised apportionment issue was not properly before this Court. For this Court to reach a contrary holding would be in **direct conflict** with the rule laid down by the Supreme Court of the United States in *Tucker* v. *Alexander,* 275 U. S. 228, 72 L. Ed. 253 (1927).

The rule enunciated in *Tucker* v. *Alexander, supra,* that the Circuit Courts of Appeals may not properly pass upon an issue not litigated below is of general application. See *Queck-Berner* v. *Macy,* 240 N. Y. 341, 148 N. E. 543 (1925); *Brown* v. *Aitken,* 90 Vt. 569, 99 A. 265 (1916); *Renton Investment Co.* v. *Commissioner,* 131 F. (2d) 330, 30 A.F.T.R. 280 (CCA 3rd Cir. 1942), and also respondent's brief in No. 10,519, pages 23-25.

POINT V. Are respondent's tugs, scows, and launches fully exempted from taxation by express provisions of the District of Columbia Code because they are taxed in Virginia?

47 D. C. Code, sec. 1201 (1940) provides for the assessment of "personal property in the District of Columbia as follows." 47 D. C. Code, sec. 1207 (1940) makes it clear that the term "personal property" includes "vessels, ships, boats, tools, implements, horses, and other animals, carriages, wagons, and other vehicles" in the District with such permanency as to be subject to taxation at full value as provided by the District law. However, there then follows 47 D. C. Code, sec. 1212 (1940) which clearly seems to exempt "vessels, ships, or boats **if it shall be made to appear by affidavit that any vessel, ship, or boat has been assessed for taxation and the taxes paid elsewhere."**

There would seem to be no question that this exemption applies to vessels, ships, or boats engaged in the business of common carriers, and by implication, to say the least, the exemption seems to apply to all vessels, ships, or boats located outside the District of Columbia to such an extent that they have been "assessed for taxation and the taxes paid elsewhere."

Inasmuch as the court relied in its second opinion on section 1207, it would seem that it should determine whether section 1212 should be construed as exempting these facilities because of their taxation in Virginia and their primary location outside the District of Columbia, even assuming that section 1207 imposed taxation on an apportionment basis—which is clearly not the case.

Of course, as will be clear to anyone who thoroughly investigates the matter, **the answer to this entire problem is and always has been as follows:**

> **The District statutes taxing personal property in the District of Columbia were intended to cover and do cover only tangible personal property in the Dis-**

trict with such a degree of permanency that it is beyond the taxing jurisdiction of any State or States.

This is simply an historical fact that cannot be mistaken once the history of the legislation and its administration is understood.

POINT VI. The position taken in the opinion on the second appeal No. 10,519 with respect to the Statute of Limitations Issue is difficult of comprehension.

Circuit Judge Prettyman, speaking for the Court on the prior appeal, found as a fact that the facilities had already been taxed on an apportionment basis. In this connection the opinion of the Court in the prior appeal stated: "For many years they have been taxed upon an apportionment of their value based upon use inside and use outside the District."

The taxation referred to by Circuit Judge Prettyman has gone on for many years on the basis of an agreement between the parties which was adhered to by respondent during each of the taxable years involved in this case. The record shows that respondent has always paid tangible personal property tax to the District of Columbia on an equitable basis mutually agreed upon as a fair amount with respect to its transportation facilities (Tr. 337-344, 352, 400, 401, 407, App. 24-32). The amount of the assessment agreed upon was revised in the early 1930's and was reviewed and approved in 1938 (Tr. 337-344, 400, 402, App. 27-33).

Respondent fully lived up to its agreement with the District of Columbia despite the fact that it was repeatedly advised by competent counsel that its transportation facilities taxed at the home port of Alexandria, Virginia, and engaged in interstate commerce were not subject to taxation under the terms of the District of Columbia law (Tr. 349-352, 385, 386, 392).

In relying upon the Board's "finding that the respondent's returns for the years 1941 to 1945, the years involved in the limitation question, were incorrect," the second opinion of this Court **wholly overlooks the fact that the Board was dealing with reporting for taxation at full value and not on an apportionment basis.** It is perfectly clear from the record that neither counsel for the District nor the District of Columbia tax officials themselves have the remotest idea as to what would constitute correct reporting of the tugs, scows, and launches for the years in question on an apportionment basis (No. 10,519, Tr. 30, 56-61). Consequently, how can this Court possibly hold that the returns—which were filed as agreed upon in advance with the District tax officials—were incorrect? In any event, the Court's holding is not supported by the Board and its misplaced reliance on the Board for the result reached is not supported by the record.

This Court on the prior appeal expressly found that respondent's facilities have already been taxed on the basis of apportionment and the record unquestionably shows that respondent reported its facilities in exact accordance with its agreement with the District. This raises the question:

> Having reported in exact accordance with its agreement with the District of Columbia and having been taxed on the basis of apportionment, how can it conceivably be said that respondent is subject to further taxation on the basis of apportionment for years against which the statute of limitations has run?

We respectfully repeat that the Court's answer to this question in its second opinion is difficult of comprehension. However, one thing is clear: **The second opinion effectually repeals the Statute of Limitations in the District of Columbia.**

POINT VII. The second opinion results in violating the Constitution of the United States by authorizing the taking of property without due process of law, by authorizing singling respondent out for unfair discriminatory treatment, by authorizing denial of the right to equal treatment, by authorizing taxation without any legislative standards whatsoever, and by authorizing retroactive taxation without any standards whatsoever, legislative or otherwise. The constitutional violations in this case are not just theoretical—the record shows that they are actual, real, and deadly serious.

As pointed out during the course of the proceeding before the Board prior to the first appeal: "It is quite apparent from the whole record that some extraneous factor has permeated and unmistakably characterized" the District's "entire case." No other inference can reasonably be drawn from the record.[27]

Why, after nearly a half century's construction to the contrary, was it decided that respondent's tugs, scows, and launches primarily located in Virginia and Maryland and engaged in interstate commerce must be subjected to District of Columbia tangible personal property taxation at 100% of value?

Why were respondent's tugs, scows, and launches singled out for greatly exaggerated valuation on a basis never imposed against any other taxpayer in the history of the District of Columbia?[28]

Why were respondent's tugs, scows, and launches singled out for taxation without the benefit of enabling special legislation by Congress when it was admitted that the property of other taxpayers similarly situated could not be taxed without such enabling legislation?

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[27] See pp. 106 to 113 of the Joint Appendix to the company's brief in No. 9827.

[28] See pp. 96 to 107 of the Joint Appendix to the company's brief in No. 9827.

Why, when it required only a few months to secure special legislation properly imposing a tax on railway equipment engaged in interstate commerce on a fair and equitable apportionment basis, was like legislation not requested to cover respondent's water transportation facilities engaged in interstate commerce?

Why, after this Court's prior opinion holding that there could be no taxation at full value, has the District proposed, on an alleged fair and equitable apportionment basis, to increase its already greatly exaggerated assessment at 100% of full value by an added write-up of 73% on, over, and above the exaggerated 100% of full value?[29]

We repeat: The constitutional violations involved in this case are not just theoretical—they are actual, real, and deadly serious. Such violations constitute the taking of property without due process of law, they violate the right of respondent not to be singled out for unfair discriminatory treatment, they constitute a denial of respondent's right to equal treatment, and they constitute a violation of respondent's right to be taxed only on the basis of standards provided by Congress reasonably establishing its legal obligations. Such action is in violation of the Fifth Amendment to the Constitution and Article I, Section 8 of the Constitution and clearly contravenes the spirit of the Fourteenth Amendment to the Constitution.

There can be no question in this case that respondent's tugs, scows, and launches are legally in the **same class** as railroad cars and land vehicles. In the course of the Court's second opinion, Circuit Judge Fahy made this plain as follows:

> "In the *Pullman* opinion a factual and, it may be argued, a legal distinction was suggested between railroad cars and land vehicles, on the one hand, and, on the other, ships or vessels engaged in interstate commerce but having a home port. Any distinction of this character affecting the tax situs of the vessels here involved has been removed by *Ott* v. *Mississippi Barge Line Co.*, 336 U. S. 169, 172-4 (1948)."

[29] See company's brief in No. 10,519, pp. 2, 11, 21, and 30.

Neither can there be any question in this case that the **"special treatment"** accorded by the District for the taxation of railroad cars and motor vehicles is not granted for respondent's tugs, scows, and launches, all of which are admittedly in the **same class**. In connection with such "special treatment" Circuit Judge Fahy stated in the instant second opinion:

> "It is contended, finally, that the enactment by Congress of special and detailed legislation for the taxation of railroad locomotives and rolling stock which is in the District of Columbia part of the time negatives a construction of the general taxing statutes which would permit an apportioned tax on personal property not included in such separate legislation. We do not feel justified in ascribing this result to the special treatment by Congress of the problem of railroad equipment, nor to the special legislation applicable to motor vehicles, which are taxed according to the number of months they have a situs in the District (47 D. C. Code §§ 1210, 1211 (1940)). * * *"[30]

In the course of rendering the Supreme Court's opinion in favor of the taxpayer in *Hillsborough Township* v. *Cromwell*, 326 U. S. 620, 90 L. Ed. 358, 362-363 (1946), Mr. Justice Douglas said:

> " * * * The jurisdiction of the federal court in New Jersey was invoked by reason of diversity of citizenship and the allegation that **the taxing authorities had consistently, systematically and intentionally singled out respondent for discriminatory treatment in the assessment of taxes** for which she was without remedy under the laws and decisions of New Jersey. It was prayed that the assessments be declared invalid as in contravention of the due process and equal protection clauses of the Fourteenth Amendment * * *.
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> "The equal protection clause of the Fourteenth Amendment **protects the individual from state action**

[30] The position taken by this Court is directly contrary to the controlling principles enunciated by the Supreme Court in *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 83 L. Ed. 536 (1939).

> **which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment.** He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class. Sioux City Bridge Co. v. Dakota County, 260 US 441, 445-447, 67 L ed 340, 342, 343, 43 S Ct 190, 28 ALR 979; Iowa-Des Moines Nat. Bank v. Bennett, 284 US 239, 247, 76 L ed 265, 272, 52 S Ct 133; Cumberland Coal Co. v. Board of Revision, 284 US 23, 28, 29, 76 L ed 146, 149, 150, 52 S Ct 48. * * *"

Certainly the Fifth Amendment should be held to protect respondent against the taking of property and the denial of due process of law through unfair discriminatory treatment while **others in the same class are accorded favorable and admittedly "special treatment."** And as to the Fourteenth Amendment, in *Hurd* v. *Hodge,* 334 U. S. 24, 92 L. Ed. 1187, 1195 (1948), Chief Justice Vinson, speaking for the Supreme Court, stated that we certainly "cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights" in the District of Columbia than it does in the States.

Now, as to the standards for fixing respondent's alleged liability: Immediately the question arises, What standards?

It is true, as we have seen, that in 1949 during the course of the hearing before the Board with respect to the opinion and mandate of this Court on the prior appeal, the District proposed to increase respondent's assessment from an exaggerated 100% of full value to 173% thereof as a standard for taxing on the basis of alleged fair and equitable apportionment. However, prior to the 1949 hearing before the Board there had never been any standard proposed and

the entire concept is wholly new in the District of Columbia.

The fact is, with one exception, there has never to this day been any taxation on the basis of apportionment in the District of Columbia because, as fully shown above, the District officials, the Congress, and this Court understood that no such taxation was authorized under the applicable statutes. This appears to have been true of the District of Columbia personal property tax law of 1877, as well as the 1902 law, which as revised is now applicable. The one exception, of course, relates to the special legislation requested by the District and enacted by Congress in 1945 to authorize the taxing of railway equipment on an apportionment basis. No tax was imposed on the railway equipment, however, until 1947. See *Pennsylvania Railroad Co.* v. *District of Columbia, supra.*

We are here concerned with wholly non-existent standards for **retroactively**[31] imposing tax on July 1 of each of the years 1940 through 1945 with respect to respondent's tugs, scows, and launches. The controlling principles were clearly stated by the Supreme Court in *Schechter* v. *United States,* 295 U. S. 495, 79 L. Ed. 1570, 1580, 1591 (1935) as follows:

> "Second. **The question of the delegation of legislative power.** We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. Panama Ref. Co. v. Ryan, 293 U. S. 388, ante, 446, 55 S. Ct. 241. The Constitution provides that 'all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives,' Art. 1, § 1. And the Congress is authorized 'to make all laws which shall be necessary and proper for carrying into execution' its general power. Art. 1, § 8, par. 18. **The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus**

[31] Clearly, such taxation is not proper. *Helvering* v. *R. J. Reynolds Tobacco Co. supra.*

vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the National Legislature cannot deal directly. We pointed out in the Panama Ref. Co. Case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function **in laying down policies and establishing standards,** while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, **cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.** Id. p. 421.

"Accordingly, **we look to the statute to see whether Congress has overstepped these limitations,—whether Congress** in authorizing 'Codes of Fair Competition' **has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.**

* * * * *

"In view of these conclusions, we find it unnecessary to discuss other questions which have been raised as to the validity of certain provisions of the code under the due process clause of the Fifth Amendment.

"On both the grounds we have discussed, **the attempted delegation of legislative power** and the attempted regulation of intrastate transactions which affect interstate commerce only indirectly, **we hold the code provisions here in question to be invalid** * * *."

Congress is empowered to exercise exclusive legislative authority over the District of Columbia by Article 1, section 8 of the Constitution. It has not "established the standards of legal obligation" of respondent. This Congress must do in "performing its essential legislative func-

tion" and "is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *Schechter* v. *United States, supra.*

In *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 79 L. Ed. 446, 458, 459, 464, 465 (1935), the Supreme Court stated:

> "The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute. * * *
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> "The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. 1, § 1. And the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. 1, § 8, par. 18. The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. * * *
>
> * * * * *
>
> "* * * The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government.
>
> * * * * *
>
> "* * * To repeat, we are concerned with the question of the delegation of legislative power. If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown. * * *"

After proposing in 1949 the above-mentioned change from full value and increase from 100% to 173% as its

idea of fair and equitable apportionment, the District necessarily admitted that it does not know how to impose an apportionment tax in this case because of the absence of a statute authorizing or imposing any such tax. The record shows that counsel for the District freely admits that he does not know how to impose an apportioned tax and states that, "The tax officials don't know." The Board countered with the query: "And I am supposed to know" (No. 10,519, Tr. 30, 56-61).[32]

For many years, including all of the years involved in this case, Congress has left it to the District administrative officials **to fix the rate** of tax on tangible personal property subject to taxation in the District of Columbia. **This Court in its opinion in the second appeal has now held that Congress has also left it to the District administrative officials to fix the basis for taxation as well as the rate of tax.** Thus it would seem that the only role played by Congress with respect to the taxation complained of by respondent here is that Congress has said to the administrative officials of the District of Columbia: **"Go tax."**

To the "go tax" instructions of Congress to the District administrative officials **this Court in its opinion on the second appeal has added "at your own rates and on your own basis."**

This Court in its second opinion not only holds that Congress has told the District administrative officials to **"tax at your own rates and on your own basis,"** but also holds that Congress has further told the District administrative officials, **"AND IMPOSE TAX AND PENALTIES RETROACTIVELY EVEN THOUGH YOU HAVE NEVER TOLD THE TAXPAYER THE BASIS FOR THE TAX AND EVEN THOUGH YOU HAVE ALWAYS TOLD THE TAXPAYER THAT YOU HAD NO AUTHORITY TO IMPOSE ANY TAX ON AN APPORTIONMENT BASIS."**

---

[32] Nevertheless, this Court's second opinion reaches the unsupported conclusion that respondent's returns were not correct. See Point VI above dealing with the Statute of Limitations Issue.

This abdication and delegation of the essential legislative functions of Congress in violation of its constitutional duty to establish the standards of legal obligation has created a **chaotic and intolerable** situation. The District administrative officials freely admit that they don't know how to impose any such tax. In *Queen City Brewing Co.* v. *District of Columbia, supra,* this Court, through Chief Justice Groner, Justice Miller, and Justice Vinson, was of the opinion that it was **"unthinkable" that Congress would do such a thing.** If, however, as we are now told, the Congress did so abdicate and delegate its authority in 1902 or thereafter, its action violates Article 1, Section 8 of the Constitution. *Schechter* v. *United States, supra,* and *Panama Refining Co.* v. *Ryan, supra.*

CONCLUSION.

For the foregoing reasons we respectfully urge that this Court should (a) withdraw its opinion entered July 24, 1950, in No. 10,519, together with the findings of fact made therein, and order a rehearing of this case before the full Court, or (b) in the alternative, reverse its opinion entered July 24, 1950, reinstate its opinion entered March 28, 1949, and thus affirm the decision of the Board entered November 30, 1949.

Respectfully submitted,

DAVID R. SHELTON,
Counsel for Respondent.

I, David R. Shelton, counsel for the respondent, do hereby certify that the foregoing petition for a rehearing in this case is presented in good faith and not for delay.

DAVID R. SHELTON.

APPENDIX C

APPENDIX C.

Board of Commissioners
John Russell Young
President

C. W. Kutz
Colonel Corps of Engineers
U. S. Army

Guy Mason

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICES
WASHINGTON 4, D. C.

G. M. Thornett
Secretary

July 17, 1945

Honorable Theodore G. Bilbo, Chairman,
Committee on the District of Columbia
United States Senate
Washington, D. C.

My dear Senator Bilbo:

The Commissioners of the District of Columbia have the honor to submit to you herewith draft of a proposed bill "To provide for the taxation of rolling stock of railroad and other companies operated in the District of Columbia, and for other purposes."

The purposes of this legislation is to provide for District of Columbia statutory authorization for the taxation of migratory railroad rolling stock, that is, railroad personal property which does not have a definite and permanent situs in the District. The great majority of the states have statutes specifically providing for the taxation of property of the character covered by this legislation but the District of Columbia has never had any such law. It is believed that before property of the kind included in this bill may be taxed, there must be specific statutory authority therefor.

The Commissioners therefore recommend enactment of the proposed legislation.

The proposed draft was submitted to the Bureau of the Budget and returned to the Commissioners with the advice that there is no objection on the part of that office to the presentation of the bill to Congress.

Respectfully,

/s/ John Russell Young
President
Board of Commissioners, D. C.

Office-Supreme Court, U. S.
FILED
FEB 8 1951
CHARLES ELMORE CROPLEY
CLERK

No. 491

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

THE SMOOT SAND & GRAVEL CORPORATION, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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DIVISION OF PRINTING AND PUBLICATIONS—D. C. GOVERNMENT

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DARK PAGE BLEED THRU

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals for the District of Columbia (R. 31-35) has not been reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 45-53) is reported in 184 F. 2d 987.

GROUNDS OF JURISDICTION

Although the petitioner has made a jurisdictional statement apparently in compliance with Rule 38, par. 2, of this Court (Br., p. 2), it has not stated the grounds on which

the jurisdiction of this Court is invoked as required by Rule 27, par. 2(c), of this Court.

COUNTER STATEMENT OF THE CASE

This is the same case in which the District of Columbia petitioned this Court for a writ of certiorari in No. 780, October Term, 1948, which was denied (*Smoot Sand & Gravel Corp.* v. *District of Columbia*, 84 U. S. App. D. C. 367, 174 F. 2d 505, certiorari denied, *sub nom., District of Columbia* v. *Smoot Sand & Gravel Corp.*, 337 U. S. 939). The United States Court of Appeals for the District of Columbia Circuit had stated that the question in the case before it was whether the District of Columbia could levy its property tax upon the full value of the Smoot Company's tugs and scows, and that (84 U. S. App. D. C. 367, 174 F. 2d 505): "For many years they have been taxed upon an apportionment of their value based upon use inside and use outside the District." In deciding the case the Court of Appeals said:

> "We conclude that the District of Columbia could constitutionally tax these tangibles, used exclusively in interstate commerce, upon a fair apportionment of value, but could not constitutionally tax them at full value."

The question presented in the District's petition for writ of certiorari in No. 780, *supra*, was whether a statute enacted by the Congress of the United States taxing all property at its full value, specifically including vessels, ships and boats, in the District of Columbia, was within the Constitutional jurisdiction and power of the Congress of the United States. The District contended that the doctrine of "actual situs" applied to the Smoot Company's vessels and boats involved and, therefore, taxation of such property, at full value, was proper.

In the Smoot Company's brief in opposition to the District's petition for a writ of certiorari in No. 780, *supra*, it was stated (p. 14):

> "* * * Certainly it is self-evident that the Constitution did not empower Congress to impose tangible personal property taxes for the benefit of the District of Columbia—at full value, with no apportionment—on personality [sic] having a taxable situs on the basis of apportionment or otherwise, in any state or states."

The Smoot Company, having won its legal point that it must be taxed upon an apportionment-of-value basis as to the personal property involved, contended subsequently before the Board of Tax Appeals (R. 2, 3, 27) and the Court of Appeals (R. 45, 46) that it could not be taxed at all in the absence of a statute which provided a method of apportionment.

In its petition for a writ of certiorari in No. 780, October Term, 1948, the District of Columbia stated the facts as follows:

"Laws applicable to the District of Columbia, enacted by the Congress of the United States in the exercise of exclusive jurisdiction over the District of Columbia pursuant to the Constitution of the United States, require that *all personal property* in the District of Columbia subject to taxation, *including vessels, ships and boats,* shall be listed and assessed for taxation at *not less than the full and true value thereof in lawful money.*

"The respondent, a Delaware corporation having its only office, with exception of its statutory office in Delaware, in the District of Columbia, has, since 1927 when it was organized, owned various vessels and boats (consisting of dredges, launches, tugboats, and scows). The tugboats and many of the scows, during the fiscal years ended June 30, 1941, to June 30, 1945, inclusive, were daily used in the

District. They were sent down the Potomac River from the District of Columbia to various sand and gravel deposits of the respondent in the Potomac River and its tributaries from which sand and gravel was brought back to respondent's storage places in the District of Columbia (R. 34-37).

"The Assessor of the District of Columbia assessed personal property taxes for the fiscal years referred to above against respondent upon the basis of the full and true value of the tugboats and scows which were daily in the District and used in transporting its sand and gravel in and to the District of Columbia. The Assessor did not include in such assessments any of respondent's dredges or any of its scows which were out of the District, sunk, or otherwise out of commission (R. 35, 36).

"The respondent appealed from the aforesaid assessments to the Board of Tax Appeals for the District of Columbia upon the principal ground that the vessels and boats assessed were not subject to taxation in or had any situs in the District of Columbia, permanent or otherwise (R. 7, 15).

"The Board of Tax Appeals sustained the validity of the assessments, except with respect to certain scows (R. 42, 120, 121). Respondent petitioned the United States Court of Appeals for the District of Columbia Circuit for a review of the decision of the Board of Tax Appeals upon several grounds, one being the contention that imposition of tangible personal property taxes by the District of Columbia on the basis of 100% of value rather than on the basis of apportionment is in violation of the Constitution of the United States, particularly in violation of the grant of power extended to the Congress over the District of Columbia by Art. I, Secs. 8 and 9 of the Constitution, the Fifth Amendment thereto, and the 'spirit' of the commerce clause, 'as well as other provisions of the Constitution' (R. 2-7).

"On March 28, 1949, the United States Court of Appeals reversed the decision of the Board of Tax Appeals and

held 'that the District of Columbia could constitutionally tax these tangibles, used exclusively in interstate commerce, upon a fair apportionment of value, but could not constitutionally tax them at full value.' (R. 201)."

After this Court denied the District's petition for a writ of certiorari in No. 780, *supra*, the Board of Tax Appeals, on July 27, 1949, made an order vacating and setting aside its prior decision in the case, and directing that further proceedings be had not inconsistent with the opinion of the Court of Appeals (Tr. 2). Further proceedings were held before the Board (R. 1-28).

During such proceedings before the Board the District proposed a method of determining the amount of tax due the District for the tax years involved based upon an *apportionment of the value* of the Smoot Company's scows, tugs, launches and dredges, which were used in the Company's business of production and sale, pursuant to the mandate and opinion of the Court of Appeals, and introduced evidence in support of such proposed tax apportionment (R. 1, 3-24).

The District did not contend that its proposed basis of apportioning the value of the Smoot Company's floating equipment was the only basis but, on the contrary, urged that "if there is a different, a more equitable basis of apportionment," the Company submit it to the Board for consideration (R. 3, 25). The Company, however, did not file any proposed different basis of apportionment; instead, it contended that since the District statute does not provide for apportionment it could not be taxed on an apportionment basis (R. 2, 3, 27).

In an effort to obtain compliance with the mandate of the Court of Appeals, the District went so far as to file a motion with the Board of Tax Appeals seeking an order of the Board directing the Smoot Company to submit, for consideration of the Board, a substitute apportionment formula for the taxation of the property involved in lieu of the

formula submitted by the District (R. 36), which was denied by the Board (R. 37).

Thereafter, the Board of Tax Appeals entered Findings of Fact (R. 28-30) which were partially amended (R. 37) on motion of the District (R. 35). Subsequently, the Board of Tax Appeals entered its final order and decision authorizing a refund of the taxes collected (R. 38, 45).

The District petitioned for a review of the Board's decision by the United States Court of Appeals for the District of Columbia Circuit (R. 39-42), alleging that the Board had failed to comply with the mandate of the Court of Appeals (R. 39). The points on appeal were as follows (Tr. 101):

> "1. The Board of Tax Appeals erred in failing to comply with the mandate of the United States Court of Appeals for the District of Columbia Circuit.
>
> "2. The Board of Tax Appeals erred in refusing to assess the Company with respect to its scows, tugs, launches and dredges upon the basis of apportionment of value as proposed by the District.
>
> "3. The Board of Tax Appeals erred in denying the District's motion to order or direct the Company to submit a substitute apportionment formula for consideration by the Board.
>
> "4. The Board of Tax Appeals erred in making its Conclusion of Law No. 10 in all respects."

The Court of Appeals reversed the Board of Tax Appeals, and again remanded the case for further proceedings consistent with its opinion (R. 45-53). In its opinion the Court cited and discussed many cases on the subject of personal property tax apportionment under general statutes similar to the statute involved in the present case, including decisions of this Court and the recent barge and towboat tax case of *Reeves, Commissioner* v. *Island Fuel & Transportation Co.*, ... Ky. ....., 230 S. W. 2d 924, decided

March 17, 1950, (R. 45-53), in which this Court, on October 16, 1950, denied a petition for writ of certiorari (No. 277, October Term, 1950, ... U. S. ....., 19 L. W. 3106). The Court also thoroughly considered the local statute involved and referred to similar statutes of other jurisdictions. The Court stated (R. 50):

> "In all these cases the statutes imposed in general terms an ad valorem tax on personal property without provision for apportionment. Yet the States were not required to forego their fair share of taxes on properties which habitually moved in interstate commerce in and out of the States and were used in business within their respective borders. A tax at full value would not have been fair or permissible, but it did not follow that none at all could be obtained. We find no sufficient reason to depart from such decisions."

The Court also stated (R. 46) that no personal property tax is levied on the property involved in Delaware, that such tax has not been paid in Maryland, but that taxes are levied on the equipment in Virginia on the basis of an assessment of approximately 30% of its value. As to the method of apportionment, the Court said (R. 53):

> "As to the method of apportionment we think the Company, in the light of this decision, should be afforded another opportunity to submit a plan for consideration; and that the District of Columbia authorities should not formulate its plan until such opportunity is given and, if availed of, the Company's plan is considered along with other relevant plans and evidence."

SUMMARY OF ARGUMENT

Although there are nine questions presented in the petition, the real controversy is whether petitioner's vessels, which are con-

stantly used in petitioner's sand and gravel business centering in the District of Columbia, may be taxed on an apportionment basis under the provisions of a general statute which taxes all property. The Court of Appeals decided that this could be done, basing its decision on a long line of cases decided from 1890 to 1950. The petition should, therefore, be denied.

Petitioner has not complied with Rule 38, par. 2, of the Rules of this Court, which is sufficient reason for denying the petition.

None of the questions presented squarely presents a question whether the Court of Appeals has decided a question of general importance to the public as distinguished from that of the parties, which has not been settled by this Court.

None of the questions presented, when applied to the pertinent facts as shown by the record, warrants granting the petition for writ of certiorari under the reasons set forth in Rule 38, par. 5(c), and the petition should therefore be denied.

ARGUMENT

I

The Petition Should Be Denied

Notwithstanding the nine questions presented in the petition, respondent submits that the real controversy is whether petitioner's vessels, which are constantly used in petitioner's sand and gravel business centering in the District, may, under the existing facts, be taxed on a basis of an apportionment of value under the provisions of a general statute which imposes a tax on all tangible personal property not specifically exempted, including vessels, ships and boats. The Court of Appeals decided this question in the affirmative and based its decision (R. 45-53) on a long line of cases beginning with *Pullman's Palace Car Company* v. *Pennsylvania,* 141 U. S. 18 (1890), and ending with *Reeves, Commissioner* v. *Island Fuel & Transportation Co.,* ..... Ky. ....., 230 S. W. 2d 924 (1950), in which this Court

denied a petition for writ of certiorari on October 16, 1950 (No. 277, October Term, 1950, ... U. S. ....., 19 L. W. 3106). Applying these circumstances to the reasons set forth in Rule 38, par. 5(c) of the Rules of this Court for granting petitions for writs of certiorari, it is clear that there is no question of general importance, or a question of substance relating to the construction or application of the Constitution or statute of the United States which has not been, but should be, settled by this Court.

Petitioner has not complied with Rule 38, par. 2, of the Rules of this Court, which is sufficient reason for denying the petition. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178. This Court has stated that petitions, supporting briefs and replies should be carefully prepared, contain appropriate references to the record, and present with studied accuracy, brevity and clearness whatever is essential to ready and adequate understanding of points requiring the Court's attention. *Furness, Withy & Co.* v. *Yang-Tsze Insurance Association*, 242 U. S. 430, 434; *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508. The petition contains not only matters which are required but also much argument and other matter, such as a specification of errors, which properly belong in a supporting brief, and which Rule 38, par. 2, provides may be annexed to the petition or presented separately. There are no references to the printed Record from pages 10 to 21, inclusive, and it is almost impossible to determine what portions of the petitioner's "REASONS FOR GRANTING THE WRIT" on pages 11 to 21, inclusive, constitute the reasons relied on for the allowance of the writ as distinguished from argument.

None of the "QUESTIONS PRESENTED" in the petition squarely presents a question whether the United States Court of Appeals for the District of Columbia Circuit has decided a question of general importance, yet the first reason relied on for the allowance of the writ is (Petition,

p. 11) that the opinion of the Court of Appeals is of general importance and the gravest concern. This Court has stated that cases of general importance are those involving principles the settlement of which is of importance to the public as distinguished from that of the parties, *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393, and not to give the defeated party another hearing, *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163. When this case was before the Court of Appeals the first time, that Court stated (84 U. S. App. D. C. 367, 174 F. 2d 505):

> "The question is whether the District of Columbia can levy its property tax upon the full value of these tugs and scows. For many years they have been taxed upon an apportionment of their value based upon use inside and use outside the District."

The Court concluded that the District could constitutionally tax the property involved upon a fair apportionment of value, but could not constitutionally tax it at full value. In the petitioner's brief in opposition to the District's petition for a writ of certiorari (No. 780, October Term, 1948) the position was taken that there was no special or important reason for certiorari; that the opinion of the Court below was correct; that the issue involved was one of very limited local application; that there was no conflict of decision; and that the District's petition for a writ of certiorari should be denied (Br., pp. 7, 15). The District's petition was denied (337 U. S. 939). In other words, petitioner itself has previously contended that no question of general importance is involved.

The *first* "question presented" as to whether District of Columbia tangible personal property taxes may constitutionally be imposed against the petitioner was disposed of by the first decision of the Court of Appeals in this case, in which this Court denied certiorari (337 U. S. 939). The further question under Question No. 1 as to

whether the taxes may be imposed retroactively for five years, allegedly without legislative authorization, would seem to be answered by the applicable statute, the findings of fact of the Board of Tax Appeals, and the second decision of the Court of Appeals. Sec. 47-1408, D. C. Code 1940, provides that in the case of a "false or incorrect" return the tax may be assessed at any time; the Board of Tax Appeals found as a fact (R. 117, No. 780, October Term, 1948, in this Court) that petitioner's tax returns for the five fiscal years (1941 to 1945, inclusive), were "false and incorrect"; and the Court of Appeals decided, based upon the Board's findings, that assessments for those years were not barred (R. 53).

There is no foundation in the record for the *second* and *third* "questions presented". There is no evidence to support the assertion that the petitioner has been singled out for discriminatory treatment in the assessment of tangible personal property taxes. Undoubtedly the decisions of the Court of Appeals in this case will be applicable to all taxpayers in the same class. In *Warring v. Colpoys*, 74 App. D. C. 303, 306, 122 F. 2d 642, 645, cert. denied 314 U. S. 678, the Court of Appeals said that "When a case is decided it is expected that people will make their behavior conform to the rule it lays down * * *."

The *fourth* "question presented" is not within any of the reasons prescribed in Rule 38, par. 5(c), of the Rules of this Court which would warrant review on writ of certiorari; and the Court of Appeals thoroughly and properly distinguished the case of *Queen City Brewing Co.* v. *District of Columbia*, 77 U. S. App. D. C. 213, 134 F. 2d 44, cert. denied 319 U. S. 767, (R. 51, 52), which petitioner asserts is in direct conflict with the Court's decision in the present case (Petition, pp. 8, 14-19).

The *fifth* "question presented" propounds the question whether the opinion of the Court of Appeals (R. 45-53) violates the Fifth and Fourteenth Amendments to the Con-